BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2019-184-E

South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Dominion Energy South Carolina, Inc.'s Standard Offer Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)	)	Docket No. 2019-184-E

AMENDED SURREBUTTAL TESTIMONY OF STEVEN J. LEVITAS

ON BEHALF OF

THE SOUTH CAROLINA SOLAR BUSINESS ALLIANCE

OCTOBER ~~11~~12, 2019

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. Steven J. Levitas. My business address is 130 Roberts Street, Asheville, North Carolina 28801.

Q. WHAT IS YOUR OCCUPATION?

A. I am the Senior Vice President for Strategic Initiatives for Pine Gate Renewables, LLC.

Q. DID YOU PREVIOUSLY FILE DIRECT TESTIMONY IN THIS PROCEEDING?

A. Yes I did.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY IN THIS PROCEEDING?

A. The purpose of my surrebuttal testimony is to respond to certain elements of the Rebuttal Testimony of Daniel F. Kassis filed on behalf of Dominion Energy South Carolina ("DESC") in this proceeding.

Q. WHAT IS YOUR OVERALL RESPONSE TO WITNESS KASSIS'S TESTIMONY?

A. SCSBA and I appreciate that DESC has accepted or otherwise addressed a number of recommendations made in my testimony regarding DESC's proposed form renewable power purchase agreements ("PPAs"). The edits that DESC has made to the form PPAs satisfactorily resolve a number of the issues that I previously raised. In addition, in light of those concessions on DESC's part, SCSBA is willing to abandon certain other changes to the form PPAs that we previously requested. Thus, the only unresolved issues are those I identify and discuss below.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION OF THE FEDERAL ENERGY REGULATORY COMMISSION'S NOTICE OF PROPOSED RULEMAKING REGARDING PURPA?

A. As an initial matter, the Notice of Proposed Rulemaking ("NOPR") is just that – a proposal that is a long way from representing the final decision by the Federal Energy Regulatory Commission ("FERC") on possible changes to PURPA implementation. On that basis alone, it should be given no weight in this proceeding. Moreover, based on my more than thirty years of experience as a regulatory lawyer, I have substantial concerns about the legality of the proposed rule and the factual support behind it. It will be vigorously opposed by many interested parties and if adopted in its current form will likely be subject to legal challenge. In short, it is anyone's guess whether the NOPR will ever become a proposed rule, and if so in what form. In the meantime it has no legal significance, nor does it constitute "guidance" from FERC on any issue.

Q. ARE THERE PARTICULAR ASPECTS OF THE NOPR DISCUSSED BY WITNESS KASSIS THAT YOU WISH TO RESPOND TO?

A. Yes. First, at pages 9 and 10 of his Rebuttal Testimony, Witness Kassis refers with approval to FERC's argument that changes to PURPA implementation are appropriate because there is now an abundant supply of natural gas and a significant amount of renewable energy resource development has occurred without reliance on PURPA. On the first point, the Congressional mandate to FERC and the states to adopt rules promoting QF development remains the law of the land unless and until Congress decides to change it based on developments in energy markets or otherwise. On the second point, non-QF independent renewable power production has increased in markets that feature

alternative regulatory structures not present in South Carolina that remove barriers or create incentives for such resources – including retail competition, liquid wholesale markets, renewable energy portfolio standards, and virtual net metering. Second, at pages 11 through 13 of his Rebuttal Testimony Witness Kassis points to FERC's claim that independent power producers are able to finance their projects without, or with limited, fixed revenue streams. I am not aware of any evidence in the NOPR record or otherwise to support this claim with respect to independent renewable generation facilities in regulated markets such as South Carolina.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGES 15-16 OF HIS REBUTTAL TESTIMONY OF YOUR CONCEPT OF COMMERCIAL RESONABLENESS AND THE DEFINITION OF "COMMERCIALLY REASONABLE" THAT YOU PROPOSED IN YOUR DIRECT TESTIMONY?

A. As an initial matter, I would note that the two issues are largely unrelated. In my direct testimony, I explained that in evaluating DESC's proposed form PPAs, this Commission is obligated under Act 62 and PURPA to strike a balance between promoting QF development and protecting ratepayer interests. I believe that balance should be informed by a judgment as to what constitutes a reasonable balance of interests, taking into consideration common practice in the industry. Where I have objected to DESC terms and conditions, it is because I do not believe they strike this reasonable balance and thus are not "commercially reasonable."

My proposed definition of "commercially reasonable" in the DESC form PPAs serves a different purpose. There are several places in DESC's form PPAs (both as proposed and

as modified by me) where a party is required to act under the agreement in a "commercially reasonable" manner. Section 1.16 of the Large QF PPA proposed by Duke Energy Carolinas ("DEC") and Duke Energy Progress ("DEP") defines the terms "Commercially Reasonable Manner" and "Commercially Reasonable," and so provides some clarity as to the meaning of that term as it is used in those agreements. I simply propose that the same clarifying language be included in the DESC form PPA.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGES 18-19 OF HIS REBUTTAL TESTIMONY OF YOUR PROPOSAL REGARDING LIQUIDATED DAMAGES FOR FAILURE TO ACHIEVE COMMERCIAL OPERATION?

A. As a reminder, DESC originally proposed liquidated damages ("LDs") in the amount of $55,000/MW for failure to achieve timely COD. In its revised filing, DESC has reduced that amount to $41,000/MW. While SCSBA appreciates this reduction, the LDs are still extremely high – for example, a 50 MW project would face more than $2 million in liquidated damages – and also bear no reasonable relationship to actual damages that DESC would suffer in the event that a contracted Facility fails to be placed in service. Mr. Kassis acknowledges that LDs must bear some relationship to actual damages, stating that "Liquidated damages in this context are generally estimated as a proxy amount to compensate the utility for any costs or losses it incurs in obtaining replacement capacity and energy due to a QF's non-performance." It is hard to fathom how the loss of a single project from the resource plan could cause millions of dollars of damage to the utility.

With respect to energy purchases, to the extent that DESC would enter into long-term contracts in the absence of QF supply, it would be easy enough for it to do so upon early termination of a QF PPA and recover its actual damages. Where damages are so easily measured, there is simply no need for liquidated damages. And given declining natural gas prices and DESC's insistence that long-term PURPA PPAs are bad for ratepayers, it's very hard to understand why Mr. Kassis thinks the company would be damaged if it had to procure energy in another fashion. Any damages are likely to be largely administrative in nature. The reason that I proposed a reduced per MW LD amount over 20 MW is because such administrative damages are not proportional to the size of the facility and are not likely to be substantially greater in the case of a 50 MW facility that with a 20 MW one.

Q. HOW DO DESC'S PROPOSED LDS COMPARE TO THOSE PROPOSED BY DEC AND DEP?

A. DEC and DEP initially proposed pre-COD LDs equal to 2% of the expected project revenue over the life of the PPA. They have recently suggested an alternative methodology under which LDs are based on expected annual capacity payments up to 15 MW and a $10,000 per MW payment over 15 MW. My belief is that both these approaches result in dramatically lower LDs than those proposed by DESC, even with their proposed reduction.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGES 19-20 OF HIS REBUTTAL TESTIMONY OF YOUR APPROACH TO THE REQUIRED OUTSIDE COMPLETION DATE FOR THE FACILITY?

A. The key issue I was concerned about in my direct testimony is that a Seller not be held to a firm in-service date where delays are the result of utility delays in the interconnection process. I don't think it makes a difference whether there is a firm date with relief due to utility interconnection delays, or a flexible in-service date that is linked to the utility's completion of the interconnection facilities and network upgrades. I would note that in response to my testimony in Docket Nos. 2019-185-E and 2019-186-E, DEC and DEP have modified their proposed Large QF PPA to take the latter approach.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGES 20-21 OF HIS REBUTTAL TESTIMONY OF YOUR PROPOSAL REGARDING GUARANTEED ENERGY PRODUCTION?

A. I would note that the 70% guaranteed energy production value I recommended was taken from DEC and DEP's proposed Large QF PPA, which in turn is drawn from negotiated PPAs entered into by DEC and DEP over the past several years. If that is a reasonable and acceptable value for those companies, it seems appropriate for DESC as well.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGES 21-22 OF HIS REBUTTAL TESTIMONY OF YOUR COMMENTS REGARDING PPA TERMINATION DUE TO ENERGY SHORTFALLS?

A. I don't think Witness Kassis has presented a convincing case as to why DESC should be able to terminate the PPA based on a limited number of shortfall events as opposed to simply collecting liquidated damages for shortfalls. The DEC and DEP proposed Large QF PPAs, as well as prior DEC and DEP negotiated PPAs, do not allow for termination in these circumstances. Moreover, under PURPA the QF would have a right to enter into a new PPA, so DESC would not be relieved of any operational concerns. A termination

right would serve no purposes other than allowing DESC to get out of a contract it did not want to enter into in the first place.

Q. DOES WITNESS KASSIS RESPOND TO YOUR ARGUMENT THAT IT IS IMPORTANT FOR THE COMMISSION TO ADDRESS THE ISSUE OF APPROPRIATE TERMS AND CONDITIONS FOR STORAGE DEVICES IN THIS PROCEEDING?

A. No. In my direct testimony I noted the lack of any proposal by DESC regarding contractual terms for energy storage devices coupled with solar generating facilities, and the problems caused by that lack. Mr. Kassis's response, on page 23 of his rebuttal testimony, is simply to argue that DESC is not required to establish such terms and conditions, either by Act 62 or the November 30, 2018 Settlement Agreement entered into in the DESC / SCE&G merger docket. Although I continue to maintain that Act 62 reasonably requires approval of storage-related terms and conditions, even if this is not legally required it is simply sound policy to provide solar plus storage facilities with some clarity and certainty about the requirements they will have to meet. As it is, developers of such projects have no idea what operational requirements they have to meet in order to qualify for the proposed solar plus storage rate, or what other requirements DESC might seek to impose upon them in a negotiated PPA. By contrast, Duke proposed an "energy storage protocol" in its Large QF PPA, and (subsequent to the filing of my direct testimony) has now agreed to incorporate the same protocol in its Standard Offer. That energy storage protocol (as Duke has agreed to modify it), which is attached as Exhibit **Levitas-4**, was the result of thorough technical consideration by both the utilities and the

solar industry, and SBA submits that it should be used to define the operational requirements of solar plus storage facilities under DESC's contracts.

I would also note that DESC's plan to comply with its obligations under the Settlement Agreement by filing a proposed solar plus storage rate "on or before December 31, 2019" instead of in this docket is a waste of the Commission's and other parties' resources. I can think of no reason for DESC's planned course of action other than avoiding the elevated scrutiny of avoided cost calculations provided in this proceeding by Act 62.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGE 24 OF HIS REBUTTAL TESTIMONY OF YOUR PROPOSAL FOR A LIMITED DUE DILIGENCE PERIOD?

A. I would note that such a diligence period is included in DEC and DEP's proposed Large QF PPAs as well as in negotiated PPAs that DEC and DEP have executed in the past. My proposed new Section 3.1(b) to the DESC PPAs is drawn almost verbatim from the DEC and DEP Large QF PPAs.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGE 25 OF HIS REBUTTAL TESTIMONY OF YOUR PROPOSAL REGARDING THE MEASURE OF DAMAGES IN THE EVENT OF TERMINATION AFTER THE COMMERCIAL OPERATION DATE?

A. As he does elsewhere in his testimony, Mr. Kassis makes the blanket assertion that ratepayers will suffer "risk and harm" if a QF PPA is terminated but never specifies what that harm is. Nevertheless, SCSBA is prepared to accept DESC's approach to this issue, subject to several limited modifications discussed in my direct testimony. First, the proposed 50% floor on damages is totally unreasonable. If, for example, the contract

price is $32/MWh and the market price is $34/MWh, Buyer's actual damages if it had to procure replacement energy would be calculated based on $2/MWh. However, DESC's proposed floor would result in Seller having to pay Buyer damages based on a presumed impact of $16/MWh. (It is worth noting in this regard that Dominion proposes that its *own* liability if it breaches or terminates the contract shall be mitigated in the event that the seller "is able (or should reasonably be able) to enter into alternative arrangements with another power purchaser to sell its energy output to the substitute power purchaser on reasonable terms.") Second, there is no reason that the delta should be based on a renewable facility, since Buyer is not acquiring RECs and the contract price is based on avoided costs associated with a gas plant. Finally, it should be made clear here and in Section 3.5 that there are no Shortfall LDs payable in the event of post-COD termination.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGE 27-29 OF HIS REBUTTAL TESTIMONY OF YOUR PROPOSED MODIFICATIONS TO THE DESC FORM PPAS REGARDING ENVIRONMENTAL LIABILITY?

A. I made two recommendation in this regard. First, I proposed a modification to the definition of Environmental Liability such that the Seller would not be indemnifying DESC for hazardous substances "near" the Facility. "Near" is an unreasonably vague term that could mean 100 feet or a mile or more. More importantly, there is no reason that the Seller should have any responsibility to DESC with respect to environmental conditions not on or arising from its site, over which it has no control. This is doubly true if the Seller's exclusion from liability is limited in the way DESC proposes, rather than as I have suggested in my second change, which appears in Section 5.2(d) of Exhibit

Levitas-1. DESC would only limit the Seller's liability where environmental conditions were caused by DESC's gross negligence or intentional misconduct. That means an environmental condition could have been caused entirely by DESC (through ordinary negligence or intentional omissions) and the Seller would be required to indemnify DESC for such liability. That is unfair and unreasonable. Finally, it should be noted that my suggested edits in this area do not impose any liability on DESC and its ratepayers, but simply limit the imposition of liability on the Seller. (And where DESC incurs an environmental liability due to negligent behavior it seems unlikely that this Commission would allow DESC to pass the resultant costs on to ratepayers.)

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGE 29 OF HIS REBUTTAL TESTIMONY OF YOUR RECOMMENDATION REGARDING DESC'S REMEDY FOR A SELLER'S FAILURE TO ACHIEVE AN INTERIM MILESTONE?

A. I continue to believe that PPA termination is not an appropriate remedy for failure to achieve an interim milestone where the Facility can demonstrate that it will nonetheless achieve timely COD. The language that I proposed in this regard was drawn virtually verbatim from the DEC and DEP proposed Large QF PPAs, which in turn are based on prior negotiated Duke PPAs. Mr. Kassis claims that this "aligns with FERC precedent on similar issues" but does not cite the FERC precedent he alludes to, and I am not aware of any precedent supporting his position. I do, however, agree that a QF who is going to miss a milestone should have to provide reasonable advance notice to DESC that it will be missing the milestone and make its demonstration at that time.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGE 32 OF HIS REBUTTAL TESTIMONY OF YOUR RECOMMENDATION REGARDING DESC'S REMEDY IN THE EVENT OF THE SELLER'S FAILURE TO REPAIR OR RECONSTRUCT THE FACILITY AFTER SUBSTANTIAL DAMAGE DUE TO CERTAIN FORCE MAJUERE EVENTS?

A. SCSBA doesn't object to a requirement to rebuild in these circumstances, but the Seller should not face a hard deadline after which it is subject to termination and the payment of damages. The Seller should be subject to termination and damages only if it fails to comply with the obligation to repair or reconstruct the Facility as soon as reasonably possible. It is easy to imagine that an event of Force Majeure, such as a hurricane, with widespread impacts to the electrical grid or other solar projects could result in shortages in components or labor that might make it impossible to reconstruct a project by that hard deadline.

Q. ARE THERE OTHER CHANGES TO THE DESC FORM PPAS THAT YOU PROPOSED IN YOUR DIRECT TESTIMONY THAT WITNESS KASSIS DOES NOT ADDRESS IN HIS REBUTTAL TESTIMONY, AND THAT YOU BELIEVE NEED TO BE MADE?

A. Yes. First, in Section 4.2, in the event of termination due to the Seller's failure to achieve timely COD, I do not believe DESC should be entitled to both Extension Payments and liquidated damages. Second, I do not believe that the Seller should be required to provide Project Contracts to DESC with limited redactions. These contracts are proprietary in many respects that go beyond pricing, especially given that Sellers may have occasion to negotiate similar agreement with, or in competition with, DESC.

Q. WHAT IS YOUR RESPONSE TO WITNESS KASSIS'S DISCUSSION AT PAGES 36-38 OF HIS REBUTTAL TESTIMONY OF YOUR RECOMMENDATIONS REGARDING DESC'S PROPOSED NOTICE OF COMMITMENT TO SELL FORM?

A. First, I continue to think it is inappropriate to penalize a QF who fails to timely execute a PPA after LEO formation by limiting any future PPA to variable pricing for two years. As I proposed in my direct testimony, the way to deal with the concern about gaming that Mr. Kassis expresses is to preclude the QF from obtaining a higher fixed PPA price during the applicable PPA term (as reflected in the DEC and DEP proposed Large QF PPAs). Second, with respect to the prerequisites for LEO formation, the fundamental question is what steps should a QF reasonably be required to take before being able to lock in pricing. I explained in my direct testimony why it is not reasonable to require QFs to obtain all environmental permits and land use approvals without having firm pricing. In addition, the liquidated damages that I proposed for failure to place a facility in service after LEO formation constitutes a significant financial commitment on the part of the QF.

Q. ARE THERE OTHER CHANGES TO THE DESC NOTICE OF COMMITMENT FORM THAT YOU PROPOSED IN YOUR DIRECT TESTIMONY THAT WITNESS KASSIS DOES NOT ADDRESS IN HIS REBUTTAL TESTIMONY AND THAT YOU STILL BELIEVE NEED TO BE MADE?

A. Yes. First, I do not believe it is consistent with PURPA to require that a Seller have either established interconnection service or signed a System Impact Study Agreement as a condition of LEO formation, because this places control over LEO formation in the hands of the utility. My alternative suggestion was to require that if a System Impact

Study Agreement has been tendered by DESC to the Seller, it must have executed and returned it in a timely fashion.

Second, SCSBA is now prepared to accept DESC's proposed requirement that Seller commence delivery within 365 days of its Notice of Commitment to Sell, *provided* that such obligation is subject to the same Excusable Delays as the in-service deadline under DESC's proposed PPAs. That may be the intention of Section 8.iii of the proposed NOSC form, but that is not clear. At a minimum, references to the availability on "interconnection facilities" need to also reference "Network Upgrades," similar to the changes DESC agreed to with respect to its proposed PPAs. Finally, I continue to think that the Seller should have the same ability to terminate a non-contractual LEO that DESC has now agreed to with respect to PPA termination (i.e., where interconnections costs exceed $75,000 per MW).

Q. WHAT IS YOUR RESPONSE TO WITNESS NEELY'S DISCUSSION AT PAGES 30-31 OF HIS REBUTTAL TESTIMONY REGARDING YOUR CRITIQUE OF DESC'S APPROACH TO EMBEDDING THE INTEGRATION CHARGE IN ITS AVOIDED COSTS RATHER THAN IMPOSING IT AS A STAND-ALONE CHARGE?

A. I disagree with Mr. Neely's response. As an initial matter, I reiterate my position that the integration charges proposed by DESC in this proceeding are inappropriate and should be rejected at this time, as addressed in greater detail by other witnesses including SCSBA Witness Burgess. With respect to my critique of DESC's proposed approach of embedding an integration charge for future QF contracts directly in the avoided energy rate, Mr. Neely's response entirely fails to address my concerns and instead simply re-

iterates the Company's justification for embedding the change in avoided energy rates. My testimony described the problem that an embedded integration charge would present with respect to any solar facilities that are not paid a PPA price based on avoided cost, for example, solar facilities that may contract with Dominion pursuant to a competitive solicitation program or commercial and industrial program established by the Commission pursuant to Act 62. Mr. Neely's response does not address or respond to my legitimate concerns.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.